

## **REMARKS/ARGUMENTS**

Applicants respectfully request reconsideration of the present application in view of the above changes to the claims and the following remarks, which are responsive to the final Office Action mailed June 2, 2009 and Advisory Action mailed September 18, 2009.

### **I. Status of Claims**

In the final Office Action, Claims 1, 4-7, 12, 16-22, and 26-27 were noted as pending in the application and were rejected. Applicants have amended Claims 1, 16, 18, 19, 21, and 22 to further clarify the claimed invention. As a result, Claims 1, 4-7, 12, 16-22 and 26-27 are currently pending.

### **II. Rejection of Claims**

The Office Action rejected Claims 1, 4, 16, 19, 22, and 26 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 7,127,521 B2 to Hsu et al. (hereinafter “*Hsu*”). The Office Action further rejected Claim 12 under 35 U.S.C. § 103(a) as being unpatentable over *Hsu* in view of what was well known in the art. Claims 5-7, 17-18, 20-21, and 27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Hsu* in view of U.S. Patent No. 5,619,650 to Bach et al. (hereinafter “*Bach*”).

#### **a. 35 U.S.C. 102 – *Hsu***

##### **i. Independent Claims 1, 16, 19, and 22**

Applicants respectfully assert that *Hsu* does not teach or suggest each of the recitations of independent Claim 1, 16, 19, or 22, as amended. In particular, Applicants respectfully assert that *Hsu* does not teach or suggest *a data throttle limiting the transfer rate* of data from a first host to a second host where *the throttle value is less than or equal to the least of* a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts, and wherein the data transfer rates are *obtained*

*during a communication start-up process from a signaling message, and wherein at least two of the first, second, and third data transfer rates are different from one another, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22, as amended.*

Applicants note that *Hsu* is directed to “an apparatus for reducing power consumption in a network linking system, in which a load monitoring module is installed such that the load of the network can be monitored” (*Hsu*, Col. 2, lines 10-14). First, a local network interface card is connected to a remote network interface card (*Id.*, Col. 4, lines 46-49). “*After linking*, the load monitoring module is enabled to perform monitoring of network flow” (*Id.*, Col. 4, lines 63-64) (*emphasis added*). If the average network load is higher or lower than a specified threshold, *Hsu* attempts to re-autonegotiate the link between data transmissions at a new link speed. (*See Id.*, Col. 4, line 65 – Col. 5, line 24).

In the Advisory Action, the Examiner notes that *Hsu* discloses various capabilities in regard to network speeds of the local and remote network interface cards. Specifically, the Examiner points to the three possible link modes of each of these interface cards, 10 Mbps, 100 Mbps, and 1 Gbps, as their capable network speeds. Additionally, the Advisory Action states that the “network itself has a third transfer rate ([*Hsu*,] Fig. 6, first graph; Col. 4, ln. 59-66, “average load”).” Applicants respectfully submit, however, that even if the network speeds defined by the link modes of the local and remote network interface cards and the average load of the network were the same as the first, second, and third data transfer rates of independent Claims 1, 16, 19, and 22, *Hsu* still fails to teach or suggest each and every recitation of the independent claims for at least the following reasons.

*Hsu* fails to disclose a throttle value less than or equal to the least of a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts. First of all, *Hsu* is silent with respect to setting any type of throttle value. Instead, *Hsu* at best teaches performing autonegotiation to adjust the linking mode of the local and remote network interface cards during various time intervals without data transmission between both ends (*Hsu*, Col. 5, lines 7-10). Even if this was

equivalent to a data throttle that limits the first data transfer rate, however, the first data transfer rate is not limited to a value **less than or equal to the least of** the first, second, and third data transfer rates. *Hsu* explains that when the current linking mode of the local and remote interface cards is 1 Gbps and the average load of the network is lower than 50 Mbps, the linking mode of the local and remote interface cards is decreased to 100 Mbps (*Hsu*, Col. 4, line 59 to Col. 5, line 11). That is, when the first, second, and third data transfer rates are 1 Gbps, 1 Gbps, and some value less than 50 Mbps, *Hsu* teaches setting the data transfer rate of the first host to 100 Mbps. Clearly, the value less than 50 Mbps is the least of the three data transfer rates, and 100 Mbps is greater than any of those possible values. Therefore, *Hsu* does not teach a data throttle that limits the first data transfer rate to a value less than or equal to the least of the first, second, and third data transfer rates.

In another example, *Hsu* describes a scenario where both the local and remote interface cards are set to a linking mode of 100 Mbps and the average load of the network is measured to be greater than 80 Mbps. Rather than throttle the first host to a data transfer rate equal to the network's average load if it is between 80 Mbps and 100 Mbps or to 100 Mbps if the network's average load is greater than 100 Mbps, *Hsu* instead teaches **increasing** the linking mode of the local and remote network interface cards to 1 Gbps (*Id.* Col. 5, lines 7-22). If the linking mode of the local network interface card is equal to the first data transfer rate as the Advisory Action suggests, then the linking mode should never be **increased** to 1 Gbps as that will always be greater than the 100 Mbps first data transfer rate.

In fact, Figure 6 of *Hsu* shows two graphs that compare the link speeds of the network interface cards compared to the average load of the network as a function of time. At no point in time is the link speed of the network interface cards less than or equal to the average load of the network. Therefore, *Hsu* does not teach a data throttle that limits the first data transfer rate to a throttle value that is less than or equal to the least one of the first, second, and third data transfer rates of a first host, second host, and a network between the first and second hosts, respectively.

The Advisory Action argues that it is possible in *Hsu* for the two network interface cards and the network average load to all equal 1 Gbps. In such a case, the data transfer rate of the first host would be less than or equal to the least of the three data transfer rates because all the data transfer rates would be equal. Applicants note, however, that independent Claims 1, 16, 19, and 22, as amended, recite that “***at least two of the first, second, and third data transfer rates are different from one another.***” Therefore, the scenario described by the Advisory Action where all the data transfer rates are equal is not possible.

Applicants additionally point out that *Hsu* fails to disclose obtaining the transfer data rate of a network between the first and second hosts *during a communication start-up process from a signaling message*, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22. *Hsu* states that “[a]fter linking, the load monitoring module is enabled to perform monitoring of network flow [and] evaluate the average load within a time interval (for example, 10 minutes)” (*Hsu*, Col. 4, lines 63-66). Therefore, not only does *Hsu* not obtain the data transfer rate of the network from a signaling message, *Hsu* requires a period of time **after linking** in which to monitor and evaluate the network to determine the average load. While allowing ten minutes of transmitting unthrottled data before ever determining the network data transfer rate could lead to significant congestion on the network, even the congestion created during the shortest monitoring time interval described by *Hsu* of ten seconds is a clear disadvantage over obtaining the network data transfer rate during a communication start-up process (*Hsu*, Col. 5, line 14).

Based on the all of the foregoing arguments, Applicants respectfully assert that *Hsu* does not teach or suggest all of the recitations of independent Claims 1, 16, 19, and 22 and respectfully requests that the rejection of these claims be withdrawn.

## **ii. Dependent Claims 4 and 26**

Claims 4 and 26 depend from independent Claims 1 and 22, respectively, and include all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth

above with respect to independent Claims 1 and 22, it is respectfully submitted that dependent Claims 4 and 26 are further patentable over the references cited as such dependent claims now depend from an allowable base claim.

**b. 35 U.S.C. 103 – *Hsu* in view of what was known in the art**

**i. Dependent Claim 12**

Claim 12 depends from independent Claim 1 and includes all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. What was known in the art does not cure the noted deficiencies of *Hsu* and is not cited by the Examiner as doing so. Thus, for at least the reasons set forth above with respect to independent Claim 1, it is respectfully submitted that dependent Claim 12 is further patentable over the references cited as such dependent claim now depends from an allowable base claim.

**c. 35 U.S.C. 103 – *Hsu* in view of *Bach***

**i. Dependent Claims 5-7, 17-18, 20-21, and 27**

Claims 5-7, 17-18, 20-21, and 27 depend from independent Claims 1, 16, 19, and 22, respectively, and include all of the recitations of the base claims and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. The teachings of *Bach* do not cure the noted deficiencies of *Hsu* and are not cited by the Examiner as doing so. Thus, for at least the reasons set forth above with respect to independent Claims 1, 16, 19, and 22, it is respectfully submitted that dependent Claims 5-7, 17-18, 20-21, and 27 are further patentable over the references cited as such dependent claims now depend from allowable base claims.

Appl. No.: 10/758,854  
Amdt. dated 11/02/2009  
Reply to Office action of June 2, 2009

### **III. Conclusion**

In light of the remarks above, Applicants respectfully submit that the application is in condition for allowance and respectfully requests that a Notice of Allowance be issued. The Examiner is encouraged to contact Applicants' undersigned attorney to resolve any remaining issues in order to expedite examination of the present application.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

/Kevin P. Belote/

Kevin P. Belote  
Registration No. 62,990

**Customer No. 00826**  
**ALSTON & BIRD LLP**  
Bank of America Plaza  
101 South Tryon Street, Suite 4000  
Charlotte, NC 28280-4000  
Tel Atlanta Office (404) 881-7000  
Fax Atlanta Office (404) 881-7777

**ELECTRONICALLY FILED USING THE EFS-WEB ELECTRONIC FILING SYSTEM OF THE UNITED STATES PATENT & TRADEMARK OFFICE ON November 2, 2009.**